(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication. Readers are requested to notify the Environmental Appeals Board, U.S. Environmental Protection Agency, Washington, D.C. 20460, of any typographical or other formal errors, in order that corrections may be made before publication.

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)	
Osage (Pawhuska, Oklahoma)	)	UIC Appeal No. 92-2
Docket No. 06S1262P5569	)	

[Decided November 24, 1992]

ORDER DENYING REVIEW IN PART
AND REMANDING IN PART

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

OSAGE (PAWHUSKA, OKLAHOMA)

UIC Appeal No. 92-2

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided November 24, 1992

Syllabus

Petitioner seeks review of an underground injection control (UIC) permit issued to an oil company for the purpose of converting a well into a Class II enhanced oil recovery injection well. He challenges the Region's denial of his request for a public hearing. He also seeks the inclusion of certain conditions in the permit.

Held: The Region erred by allowing the permittee to exceed the limit on maximum injection pressure for the purpose of well stimulation. The Region did not commit any error or abuse its discretion by denying Petitioner's request for a public hearing. The remaining issues are either moot due to changed circumstances or not reviewable since Petitioner has failed to demonstrate that he raised such issue during the public comment period. The permit is remanded (1) to include a requirement that a pressure gauge be installed as agreed to by the permittee and (2) to limit injection pressure at the wellhead in accordance with the regulations governing the permitting of Class II enhanced oil recovery wells.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Firestone:

Petitioner, Scott F. Wiehle, seeks review of an underground injection control (UIC) permit issued by Region VI of the U.S. Environmental Protection Agency pursuant to Part C of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300f *et seq.*, as amended. Region VI issued the UIC permit to Calumet Oil Company, the permittee, authorizing the conversion of a well to a Class II enhanced oil recovery injection well.[1] The well is located on Indian lands in the Osage Mineral Reserve in Osage County, Oklahoma.[2] Petitioner is a rancher and farmer

[1] Under the terms of the permit, authorization to inject fluids into the well is granted separately from the issuance of the permit. Such authorization may be granted when the operator has satisfactorily demonstrated compliance with certain construction requirements and demonstrated mechanical integrity in accordance with 40 CFR §147.2920(b)(1)(i). Mechanical integrity of the well was demonstrated on April 27, 1992.

In addition, §147.2920(e) provides that operation shall not commence until proof has been submitted to the Regional Administrator, or an EPA representative has witnessed, that any corrective action specified in the permit has been completed.

[2] The Osage Mineral Reserve in Oklahoma was established by an Act of Congress in 1906, which allows the Osage Indian Tribe, through the Bureau of Indian Affairs (BIA), to establish leasing policies and obtain royalties from oil and gas production. *See* 49 Fed. Reg. 45,292, 45,300 (Nov. 15, 1984). Because of the nature of this grant of authority, the State of Oklahoma does not regulate mineral extraction activities on the Reserve and the Oklahoma UIC program for Class II wells, approved in 1981, does not apply to injection activities on the Reserve. *Id.* In 1984, the Agency established a federal Class II UIC program in the Osage Mineral Reserve at 40 CFR Part 147 Subpart GGG. *Id.* In consideration of the large number of wells in the Osage Mineral Reserve and the fact that the Reserve already had a considerable history of regulation of Class II wells, the Agency tailored the UIC program specifically to the Reserve by drawing from existing BIA requirements, requirements from the approved

(continued...)

who owns and operates several fresh water wells near the permitted injection well. The Environmental Appeals Board has jurisdiction to consider this appeal under a delegation of authority by the Administrator.

I. *BACKGROUND*

In February 1992, the Region issued public notice of its proposal to issue a Class II UIC permit to the Calumet Oil Company. Both prior to and after the public notice was issued, Petitioner submitted comments, including reports by an engineering firm, expressing concern for the fresh water aquifer which is represented to be Petitioner's sole source of drinking water. On February 25, 1992, Petitioner requested a public hearing on the draft permit. On March 18, 1992, an informal meeting was held between Petitioner, his consultants and the Region.

On April 13, 1992, the Region issued the final permit authorizing conversion of the well under the UIC program. On or about that same date,[3] the Region responded to Petitioner's comments and denied Petitioner's request for a hearing.

The Petition for Review was filed on May 20, 1992.[4] The Petition asserts that the Region erred by (1) failing to hold a public hearing; (2) failing to require the permittee to plug abandoned Well No. 4; (3) failing to expressly provide that the approved injection pressure of 419 psig should not be "increased to fit the operator's needs"; (4) failing to expressly require in the permit that a "working, functional pressure gauge" be installed at the well to enable Petitioner to observe and monitor the pressure of injection; and (5) failing to require the permittee to conduct mechanical integrity tests more frequently than once every five years.

While the case was pending on appeal, the permittee, on September 9, 1992, filed a motion for issuance of interim authorization to inject into Well No. 6,

---

[2](...continued)
Oklahoma UIC program in effect in the rest of the State, the EPA UIC minimum requirements, and the expressed preferences of the Osage Tribe. *Id.*

[3] The administrative record does not show the exact date when the Region's Response to Comments was issued or served. Petitioner acknowledges he received a copy of the Region's Response to Comments on April 13, 1992.

[4] Agency rules require that a petition for review must be filed within thirty days after issuance of the final permit decision. 40 CFR §147.2929(j)(2). This thirty day period begins with the service of notice of the Regional Administrator's final permit decision unless a later date is specified in that notice. *Id.* While the administrative record does not show when notice of the final permit decision was served on Petitioner, the Region has represented to the Board that the Petition for Review was timely filed.

the permitted well. In this motion, the permittee asserts that changed circumstances warrant this relief. First, permittee maintains that Well No. 4 has been plugged as requested by the Petitioner. Second, it maintains it has agreed to place a pressure gauge on the Well No. 6 injection pump, again, as requested by Petitioner.

On September 11, 1992, this Board ordered the Region and Petitioner to file a response to the permittee's motion and to specifically address which issues, if any, remain on appeal in light of the alleged changed circumstances. Both the Region and Petitioner filed responses.

In their responses, both the Region and Petitioner agree that Well No. 4 has been plugged. The Region concurs that the permittee has agreed to install a permanent injection pressure gauge on Well No. 6. The Region further commits to modify the final permit to require this pressure gauge. Petitioner states, however, that the permittee has not agreed with him in writing to install the pressure gauge at Well No. 6.

In view of the changed circumstances and the agreement with the permittee, the Region maintains that there remain three issues on appeal: (1) whether the Region committed error or an abuse of discretion by not granting Petitioner's request for an administrative hearing; (2) whether the Region erred by not including as a condition in the permit that the approved injection pressure of 419 psig shall not be increased to "fit the operator's needs"; and (3) whether the Region erred by not including as a condition in the permit a requirement that mechanical integrity tests be performed more frequently than once every five years.

II. *DISCUSSION*

As a threshold matter, under the rules that govern this proceeding, a UIC permit ordinarily will not be reviewed unless the condition in question is based on a finding of fact or conclusion of law that is clearly erroneous, or involves an exercise of discretion or important matter of policy that warrants review. 40 CFR §147.2929(j)(3)(ii); *see also Avery Lake Property Owners Association*, UIC Appeal No. 92-1, at 3 (September 15, 1992)(UIC permit proceeding under Part 124). In general, the "power of review should be only sparingly exercised" and "most permit conditions should be finally determined at the Regional level * * * ." *See Avery Lake*, UIC Appeal No. 92-1, at 3 (quoting from the preamble to Part

124).[5] The burden of demonstrating that review is warranted is on the petitioner. 40 CFR §147.2929(j)(3).

We conclude that the changed circumstances identified by the permittee in its motion render two of the issues on appeal moot. *Cf. In the Matter of W.R. Grace & Company*, RCRA Appeal No. 89-28, n.6 at 4 (March 25, 1991). The permittee's action in plugging Well No. 4 has rendered that issue moot.[6] In addition, the permittee's agreement to install a pressure gauge on Well No. 6 and the Region's commitment to modify the permit to require this pressure gauge renders that issue moot, as well.

We now turn to the three remaining issues on appeal. For two of the issues, we conclude, for the reasons set forth below, that the Petitioner has not met his burden of showing that the Region's permit decision should be reviewed. For the third issue, which concerns the permit condition limiting the injection pressure at the wellhead, we conclude that the Region failed to comply with Agency regulations. That issue is remanded for modification of the permit in accordance with our discussion below.

---

[5] While this appeal arises under the special rules governing UIC permitting on the Osage Mineral Reserve, the preamble to Subpart GGG under Part 147, governing the Osage UIC program, indicates that the provisions for appeals were intended to be largely "similar or identical" to those in Part 124, governing the general UIC program. *See* 49 Fed. Reg. at 45,300.

[6] Petitioner argued that prior to approving the permit for Well No. 6, Well No. 4 should be plugged. In support of his position, Petitioner identified several Agency regulations: 40 CFR §147.2903 (prohibiting the abandonment of any injection well in a manner which allows movement of fluid containing any contaminant into the USDW thereby causing a violation of Part 142 or otherwise adversely affecting the health of persons); 40 CFR §147.2905 (requiring that an injection well must be plugged within 1 year after termination of injection unless EPA allows an extension of time under specified circumstances); 40 CFR §147.2914 (authorizing the Region to exercise its discretion to prevent movement of fluid into a USDW by requiring corrective action to plug an abandoned well within the "zone of endangering influence" of an injection well authorized by rule); and 40 CFR §147.2923 (requiring that all improperly sealed, completed or abandoned wells within the "zone of endangering influence" that penetrate the "injection zone" of a Class II well must have corrective action taken to prevent movement of fluid into a USDW). Because Well No. 4 has been plugged, we do not reach the issue of which regulation, if any, would have required plugging Well No. 4.

In his Reply to the permittee's Motion for Interim Authorization to Inject, Petitioner has not asserted that the plugging of Well No. 4 was performed improperly or did not comply with any regulation. Since Well No. 4 was plugged in July 1992, Petitioner's concerns regarding Well No. 4 have continued to be limited to the conduct of the Region prior to the plugging, i.e., that the Region made "inconsistent findings" as to the integrity of Well No. 4 prior to the plugging and that there is a "lack of accountability for decisionmaking" by the Region. *See* Petitioner's Reply to Permittee's Motion for Interim Authorization to Inject, at 2-4. In the context of this proceeding, those issues are moot.

A.

First, the Region did not commit error or abuse its discretion by not granting Petitioner's request for an administrative hearing. In this type of permit proceeding, the Region's decision to hold a public hearing is largely discretionary. 40 CFR §147.2929(f)("The Regional Administrator shall hold a public hearing whenever he finds a significant amount of public interest in a draft permit, based on the requests submitted, or at his discretion"); *Avery Lake*, UIC Appeal No. 92-1, at 2 (UIC permit proceeding under Part 124).

During the public comment period, comments were provided only by the permittee and Petitioner. Petitioner's request for a public hearing was the only request received by the Region. Notwithstanding the Region's decision to deny a public hearing on the draft permit, a Regional representative traveled to Tulsa, Oklahoma on March 16, 1992, for a meeting with Petitioner, during which meeting additional verbal comments were accepted. All of Petitioner's written and verbal comments were considered by the Region and addressed in the formal response to comments. Consequently, Petitioner was afforded ample opportunity for participation in the permit process.

In these circumstances, Petitioner has failed to show that the Region's decision not to hold a public hearing was clearly erroneous or an important exercise of discretion that warrants review.

B.

Next, we turn to the two conditions which Petitioner seeks to have included in the permit. Under the rules that govern this proceeding, the petitioner has the burden of demonstrating that he may properly seek review in accordance with §147.2929(j)(1).[7] 40 CFR §147.2929(j)(3). In particular, paragraph (1) of §147.2929(j) requires that the petition must include a statement of reasons supporting review, including a demonstration that the petitioner submitted

---

[7] Paragraph (1) of §147.2929(j) provides:

> Any person who filed comments on the draft permit or participated in the public hearing may petition the Administrator to review any condition of the permit decision. Any person who failed to file comments or participate in the hearing may petition for administrative review only to the extent of the changes from the preliminary permit to the final permit decision.

comments during the comment period, including any public hearing. *See Avery Lake*, UIC Appeal No. 92-1, at 3 (UIC permit proceeding under Part 124).

As noted earlier, the preamble to Subpart GGG under Part 147 indicates that the provisions for appeals were intended to be largely "similar or identical" to those in Part 124. *See* 49 Fed. Reg. at 45,300. We therefore conclude that, as with petitions filed pursuant to Part 124, a petitioner in a permit proceeding pursuant to Subpart GGG under Part 147 must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting the petitioner's position by the close of the comment period. *See* 40 CFR §§124.13 and 124.19(a).

In this case, Petitioner has failed to preserve the issue of whether the permit should require mechanical testing more frequently than once every five years because he failed to identify that concern during the public comment period. Accordingly, we deny review on this issue.[8]

With respect to the issue of whether the permit properly limits injection pressure, we conclude that the Petitioner failed to raise this issue during the comment period, and thus did not preserve the issue. Nonetheless, remand is necessary because it appears that the Region failed to comply with the specific regulations governing Class II enhanced oil recovery wells. The permit condition

---

[8] While we are denying review on the ground that Petitioner failed to preserve the issue for review with respect to whether the permit should require mechanical testing more frequently than once every five years, we note that this permit challenge must also fail on the merits. Agency regulations require that each well must have mechanical integrity and that mechanical integrity must be shown prior to operation. Mechanical integrity is met only if there is no significant leak in the casing, tubing or packer and there is no significant fluid movement into an underground source of drinking water through vertical channels adjacent to the well bore. 40 CFR §147.2920(b)(1) and (2). Subparagraph (i) of §147.2920(b)(1) provides that the absence of any significant leak in the casing, tubing or packer may be shown by "[p]erformance of a pressure test of the casing/tubing annulus to at least 200 psi, or the pressure specified by the Regional Administrator, to be repeated thereafter, at five year intervals, for the life of the well."

Here, the permit requires that authorization to inject will not be granted until the permittee shows to the satisfaction of the Director of the Water Management Division pursuant to 40 CFR §147.2920(b)(1)(i) that the well has mechanical integrity. The permit
further provides that (1) the injection well must have and maintain mechanical integrity consistent with 40 CFR §147.2920(b); (2) mechanical integrity must be demonstrated any time the tubing is removed from the well, the packer is reset, or a loss of mechanical integrity becomes evident during operation; and (3) the Regional Administrator may by written notice require the permittee to demonstrate mechanical integrity at any time. Consequently, the permit conditions concerning mechanical integrity not only comply with Agency regulations, but they allow for a demonstration of mechanical integrity more frequently than every five years after the initial demonstration if the Region so requires. Petitioner has failed to explain why this procedure is inadequate. As such, the Region did not err or abuse its discretion in failing to require the mechanical testing as requested by Petitioner.

at issue appears under the heading of *Operating Requirements*. It provides as follows:

> Except during well stimulation,[9] injection pressure at the wellhead shall not exceed 419 psig.

(Final Permit, Part I.B.2, at page 1 of 3.) In his appeal, Petitioner requests, without any discussion, that the Agency specify that "the approved injection pressure of 419 psig not be increased to fit the operator's needs." In response, the Region maintains that the language sought by Petitioner, would be superfluous since "the pressure of 419 psig will not be increased for any reason except well stimulation and therefore, will not be increased for any other reasons including 'any other needs of the operator.'"

The Region did not interpret Petitioner's request to change this permit condition as a challenge to the "well stimulation exception." Consequently, the Region has not addressed whether the exception for well stimulation to the injection pressure limit of 419 psig complies with the relevant UIC regulations. Rather, the Region argues it properly calculated the injection pressure of 419 psig in accordance with the formula set out in §147.2912(b)(1) and that such injection pressure complies with §147.2920(c).

For the reasons that follow, we conclude that the Region had no basis for allowing for a well-stimulation exception. The well at issue in this permit is a Class II enhanced recovery well.

Subsection (c) of §147.2920, entitled "Operating requirements for wells authorized by permit" provides:

> Injection pressure at the wellhead shall be limited so that it does not initiate new fractures or propagate existing fractures in the confining zone adjacent to any [USDW].

The only "well stimulation exception" provided for under the regulations for Class II wells is set forth in §147.2912(b), which concerns existing Class II salt water disposal wells authorized by rule:

---

[9] The permit defines "well stimulation" as "several processes used to clean the wellbore, enlarge channels, and increase pore space in the interval to be injected thus making it possible for wastewater to move more readily into the formation, and includes (1) surging, (2) jetting, (3) blasting, (4) acidizing, [and] (5) hydraulic fracturing."

> (1) For *existing Class II salt water disposal wells*, the owner/operator shall, except during well stimulation, use an injection pressure at the wellhead no greater than the pressure calculated by using [the formula set out in this paragraph].

(Emphasis added). Since the well at issue here is a Class II enhanced oil recovery well authorized by permit and not an existing Class II salt water disposal well authorized by rule,[10] reliance on §147.2912(b)(1) is not appropriate. In fact, we can find nothing in Subpart GGG which would allow a permittee of a Class II enhanced recovery well to exceed the maximum injection pressure calculated for such well. Moreover, there appears to be nothing in Parts 144 and 146 (which govern other state and federal UIC programs) which would allow a permittee to exceed the maximum injection pressure calculated for Class II wells.[11] In these circumstances, the Region impermissibly relied on §147.2912(b)(1) to support the permit's well stimulation exception to the maximum injection pressure.

The regulations for the Osage Mineral Reserve UIC program require a limitation on injection pressure at the wellhead for Class II wells authorized by permit and do not provide that this limitation may be exceeded during well stimulation for Class II enhanced recovery wells. Accordingly, the Region erred by including the "well stimulation exception" in the permit.

On remand, we believe the Region should take special care to ensure that it fulfills the primary aim of the UIC program which is to protect sources of drinking water from contamination, especially contamination resulting from pressure induced fractures in the confining zone. In this connection, we believe any reliance on §147.2912(b)(1) to suggest, even by analogy, that the Region may leave well pressure to the discretion of the permittee would be misplaced. We recognize that in establishing well pressure for a Class II well, the Region may need to take into account special circumstances such as well stimulation. Nonetheless, the Region's freedom to establish appropriate pressures for different circumstances, does not mean that the permittee shall have the freedom to set its own pressure

---

[10] The Administrative Record reflects that the Class II enhanced recovery well which is the subject of this appeal was converted from an oil well. *See* Administrative Record, at 42. Consequently, the permitted well was not previously an "existing Class II salt water disposal well."

[11] Agency regulations at Part 144, which establish minimum requirements for UIC programs and constitute a part of the UIC program for States listed in Part 147, provide that for Class II wells "[t]he owner shall not exceed a maximum injection pressure at the wellhead * * * ." Similarly, Agency regulations at Part 146, which sets forth technical criteria and standards for the UIC program, do not provide any exception to the maximum injection pressure calculated for Class II wells. *See* 40 CFR §146.23(a)(1).

limitation. Indeed, §147.2912(b)(1) does not so provide even for existing Class II salt water disposal wells. While §147.2912(b)(1) provides an exception to the use of the specific formula set forth in that section, it does not provide that no pressure need be set during well stimulation. Rather, in all such circumstances, the Region must establish and specify a single or, if appropriate, several well pressures which the Region believes will assure compliance with both the regulations and the Safe Drinking Water Act.

III. *CONCLUSION*

For the reasons stated above, the Petition for Review is denied.[12] The permit is remanded to the Region for modification to: (1) require a pressure gauge on Well No. 6 in accordance with the agreement by the permittee and (2) limit injection pressure at the wellhead in accordance with the regulations governing the permitting of Class II enhanced oil recovery wells. The Region should give public notice of the remand in accordance with 40 CFR §147.2929(d). Appeal to the Board of the remand decision will be required to exhaust administrative remedies. *See* 40 CFR §147.2929(j)(7)(iii).

So ordered.

---

[12] The permittee's motion for issuance of interim authorization is denied.